DOCKET

PROCEEDINGS AND ORDERS

DATE: 03209

ASE NBR 84-1-05736 CSY
HORT TITLE White, Derrick O.
VERSUS Maryland

DOCKETED: Nov 13 1984

Date	Proceedings and Orders
Nov 13 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Dec 13 1984	Order extending time to file response to petition until January 11, 1985.
Jan 11 1985	Brief of respondent Maryland in opposition filed.
Jan 17 1985	DISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) Justice Powell OUT.

BEST AVAILABLE COPY

PETITION FOR WRIT OF CERTIORARI

84-5736

ORIGINAL

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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DERRICK QUINTON WHITE

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Derrick Quinton White, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this Petition is attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioner

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Derrick Quinton White, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

19804.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

---

3. Do you own any cash or checking or savings account? _____

(a) If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

(a) If the answer is yes, describe the property and state its approximate value.

---

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NO

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Derrick White
DERRICK QUINTON WHITE

Subscribed and sworn to before me, a Notary Public, this 7th day of Nov., 1984.

Charles R Simmons
NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
JUSTICE

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

Of Counsel:

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Counsel for Petitioner

QUESTION PRESENTED

1. Was the death sentence imposed in this case pursuant to Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Section 412 and 414, which mandates the sentence of death unless the defendant proves by a preponderance of the evidence that mitigating circumstances outweigh aggravating circumstances, imposed in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Derrick Quinton White, requests that a writ of certiorari issue to review the judgments of the Court of Appeals of Maryland entered in these proceedings.

OPINION BELOW

The opinion of the Court of Appeals of Maryland affirming the death sentence of Petitioner is included as Appendix A. It is reported at 300 Md. 719, 481 A.2d 201 (1984).

JURISDICTION

The opinion of the Court of Appeals of Maryland affirming the sentence of death was filed on April 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV, provides in pertinent part:

> ...[N]or shall any state deprive any person or life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 412-414 provides:

Section 412. Punishment for murder.

(a) Designation of degree by court or jury. -- If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed

to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. -- This proceeding shall be conducted:

(1) Before the jury that determined the defendant guilty; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined by defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g);

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, pro-

vided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or (h).

(d) Consideration of aggravating circumstances -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of Section 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement

or contract for remuneration of the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, rape, or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in Section 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating

circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances

outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. --The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the

court or jury in making its written findings and determinations of sentence.

Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. --Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Consideration by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's findings of a statutory aggravating circumstance under Section 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar

cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under Section 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

RULES INVOLVED

Rule 772A. Sentencing -- Procedure in Capital Cases.

a. Scope.

This rule applies to all cases for which sentences are imposed under Code, Article 27, Section 413.

b. Statutory Sentencing Procedure.

If a defendant has been found guilty of murder in the first degree, and if the State has given the notice required under Code, Article 27, Section 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, Section 413.

c. Judge.

Except as provided in Rule 750, the judge who presides at trial shall preside at the sentencing proceeding.

d. Written Findings and Determination.

The findings and determination shall be made in writing in the following form:

(Caption)
FINDINGS AND SENTENCING DETERMINATION
Section I

Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT:

1. The victim was a law enforcement officer who was murdered while in the performance of his duties.

Yes No

2. The defendant committed the murder at a time when he was confined in a correctional institution.

Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

Yes No

4. The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

Yes No

5. The victim was a child abducted in violation of Code, Article 27, Section

Yes No

6. The defendant committed the murder pursuant to an agreement to contract for remuneration of the promise or remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and

the murder was committed pursuant to an agreement or contract for remuneration of the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

Yes No

Section II

Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "Yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "No" has not been proven by A PREPONDERANCE OF THE EVIDENCE:

1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay or entry of judgment pursuant to a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except irvoluntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as tc constitute a complete defense of the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

Yes No

5. The youthful age of the defendant at the time of the crime.

Yes No

6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other mitigating circumstances exist, as set forth below:

Yes No

_____

_____

_____ (Use reverse side if necessary)

(If one or more of the above in Section II have been marked "Yes", complete Section III. If all of the above in Section II are marked "No", you do not complete Section III.)

Section III

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I. ___

___ Yes No

DETERMINATION OF SENTENCE

ENTER THE DETERMINATION OF SENTENCE EITHER "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."
2. If Section III was completed and was marked "yes" enter "Life Imprisoment."
3. If Section II was completed and all of the answers were marked "no" then enter "Death."
4. If Section III was completed and was marked "no" enter "Death."

We unanimously determine the sentence to be _____

_____ Foreman _____ Juror 7

_____ Juror 2 _____ Juror 8

_____ Juror 3 _____ Juror 9

_____ Juror 4 _____ Juror 10

_____ Juror 5 _____ Juror 11

_____ Juror 6 _____ Juror 12

or, _____ JUDGE

e. Advice of the Judge.

Immediately after imposing sentence, the judge shall advise the defendant of the right to file an appeal and the time within which the defendant must exercise this right. The judge shall also advise a defendant who receives a sentence of death that (1) only his sentence will be automatically reviewed by the Court of Appeals, and (2) the sentence will be stayed pending a review of the sentence by the Court of Appeals and any appeal he may take.

f. Report of Judge.

When the judgment becomes final, the judge promptly shall prepare and send to the parties a report in the following form.

(Caption)
REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
- A. Date of Birth
- B. Sex
- C. Race
- D. Address
- E. Length of Time in Community
- F. Reputation in Community
- G. Family Situation and Background
  1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
  2. Family history (describe family history including pertinent data about parents and siblings)
- H. Education
- I. Work Record
- J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
- K. Military History
- L. Pertinent Physical or Mental Characteristics or History
- M. Other Significant Data About Defendant

II. Data Concerning Offense
- A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
- B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so, describe.
- C. Did the defendant know the victim prior to the offense? Yes ___ No ___
  1. If so, describe relationship
  2. Did the prior relationship in any way precipitate the offense? If so, explain.
- D. Did the victim's behavior in any way provoke the offense? If so, explain.
- E. Data Concerning Victim
  1. Name
  2. Date of Birth
  3. Sex
  4. Race
  5. Length of time in community
  6. Reputation in community
- F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not Guilty ___; Guilty ___; Not Guilty by Reason of Insanity ___

B. Election of Mode of Trial:
Court ___ Jury ___
If a jury trial was elected, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished)

D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so explain. Attach copies of any motion made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding
- A. List aggravating circumstance(s) upon which state relied in the pretrial notice.
- B. Election of court or jury -- Was the proceeding conducted before same judge as trial _____
before same jury _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so explain.
- C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested III. C above.
- D. Which aggravating and mitigating circumstances were raised by the evidence?
- E. On which aggravating and mitigating circumstances were the jury instructed?
- F. Sentence imposed: Life imprisonment
Death

V. Chronology
- Date of Offense
- Arrest
- Charge
- Notification of intention to seek penalty of death

Trial (guilt/innocence) -- began and ended
Sentence imposed

VI. Recommendation of Trial Court As to Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this case is attached to and made a part of this report.

_____
JUDGE

CERTIFICATION

I certify that on the _____ day of _____, 19__, I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
JUDGE

Within five days after receipt of the report, the parties may submit to the judge written comments concerning factual accuracy of the report. The judge promptly shall file his final report and any comments of the parties with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals.

STATEMENT OF THE CASE

On September 2, 1981, Petitioner Derrick Quinton White was charged by criminal information with first degree murder and robbery. On October 27, 1981, notice was filed pursuant to Maryland Code (1957, 1982 Repl. Vol.) Act. 27, See 412 of the State's intention to seek the penalty of death. Petitioner pleaded not guilty.

The State's evidence of Petitioner's criminal

agency was fairly summarized by the Court of Appeals of Maryland in White v. State, 300 Md. 719 A2d (1984) as follows:

> On August 14, 1981 White, then age 18, shot and killed Victor Joseph Furst. (Furst), age 61, during an attempt to rob Furst of the moped he was riding. The State proved the following facts, in large part through White's accomplice, Gerard Eugene Anthony (Anthony), also age 18.
>
> White and Anthony each lived on the west side of Baltimore City. They had known one another for about two months prior to the murder. Neither was employed. They had discussed getting some money illegally. On the morning of August 14 Anthony took his father's loaded revolver from their home and met White nearby. Anthony put the gun in the glove compartment of the red 1981 Pontiac T1000 which White had been driving. With Anthony at the wheel of the car, they drove into western Baltimore County. White directed them to a tile store at Rolling Road and Route 40 West which they intended to rob. With White in possession of the gun, they entered the store; but it was too crowded and they left.
>
> Anthony resumed driving with White in the front passenger seat giving directions to another store in the vicinity to rob. On their way they drove by Furst, who was riding a new moped in the opposite direction. White told Anthony that it was a good model moped, that an old man was riding it and that they were going to get it. Anthony said they should forget about the moped and "go to the money." White persisted and said that the moped would fit in the back of the Pontiac. Anthony turned the car around. They pursued the man on the moped and caught up to him in the 7400 block of Dogwood Road.
>
> As Anthony drove abreast of Furst, White pointed the gun out of the window on the passenger side at Furst. About five seconds later White fired, as Furst was turning his head away from the gun.

> Anthony immediately accelerated leaving Furst and moped lying alongside the road. When Anthony asked "what the hell did he do that for," White said the "[Furst] looked like he wasn't going to stop." Furst died of a single gunshot wound which entered his chest from the left to right and pierced the aorta.

The case was submitted to a jury which was instructed on the law of premeditated murder[1] and felony murder.[2] The jury found Petitioner guilty of felony murder and attempted robbery.

Petitioner elected to be sentenced by the jury. At the sentencing hearing the State introduced Petitioner's juvenile record and his 1980 conviction as an adult for burglary. The state also adduced through the testimony of a parole agent that Petitioner was on parole at the time of the instant offense.

The jury found the existence of a single statutory aggravating circumstance: that Petitioner committed the murder while committing or attempting to commit robbery. The

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[1]Maryland Code (1957), 1982 Repl. Vol.) Art. 27, Sec. 407 provides: "All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree."

[2]Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 410 provides: " All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping as defined in section 337 and 338 of this article, storehouse breaking as defined in section 32 and 33 of this article, or daytime housebreaking as defined in section 30 (b) of this article, or in the escape or attempt to escape from the Maryland Penitentiary, the house of correction, the Baltimore City jail, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree."

jury found the existence of two mitigating circumstances; the lack of a prior record of a crime of violence, and Petitioner's "environment." The jury did not find that Petitioner was of "youthful age" and therefore did not consider that as a mitigating circumstance.

On April 12, 1982, hearing was held for the purpose of imposing the sentence of death and to consider outstanding motions. At the hearing the court noted that it disagreed with the jury's assessment; the court noted that it did not regard the sentence of death as justified in that the court perceived no specific intent to kill. The court recognized, however, that it had no discretion to impose other than the sentence agreed upon by the jury.

On appeal pursuant to Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 414, Petitioner contended inter alia that the Maryland Capital Punishment Statute unconstitutionally places the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances and unconstitutionally restricts the sentencer's discretion to show mercy and to consider the propriety of the death sentence. The Court of Appeals of Maryland addressed the merits of those contentions and affirmed.

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW OF THE DECISIONS BELOW WILL RESOLVE IMPORTANT FEDERAL QUESTIONS,UNSETTLED BY THIS COURT'S PRIOR DECISIONS, AND AFFECTING THE CAPITAL PUNISHMENT STATUTES OF MANY STATES.

In the wake of this Court's death penalty decisions upholding the statutory schemes of several states, a number of authorities have consider the constitutionality of statutes[3] which require a penalty of death in certain circumstances after a weighing of aggravating and mitigating circumstances, without an independent focus upon whether death is the appropriate punishment in the specific case. See, e.g. State v. Dicks, 615 S.W. 2d 126, 139-31 (Tenn.) cert. denied, 454 U.S. 933 (1981); Tichnell v. State, 287 Md. 698, 728 415 A.2d 830 (1980); Houston v. State, 593 S.W. 2d 267, 276-77 (Tenn. 1980); State v. McKenzie, 177 Mont. 280, 581 P.2d 1205, 1227-30 (1978), vacated, 443 U.S. 903 (1979). Ledewitz, "The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute," 21 Duq. L. Rev. 103 (1983); see also Smith v. North Carolina, ___ U.S. ____, 76 L.Ed.2d 622 (1982) (Stevens, J., respecting the denial of certiorari). Other authorities have considered whether the Eight and Fourteenth Amendments require allocation of the burden of proof on the prosecution on the question of whether death is appropriate, and if so what the standard must be.[4] Ford v. Strickland, 696 F.2d 804,

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[3]Ariz. Rev. Stat. Sec. 13-703(e); Cal. Penal Code Sec. 190.3; Colo. Rev. Stat. Sec. 16-11-103; Conn. Gen. Stat. Sec. 53a-46a; Idaho Code Sec. 19-2515(b); Ill. Rev. Stat. Ch. 38, Sec. 9-1; Mont. Rev. Codes Ann. Sec. 46-18-301; N.J. Rev. Stat. Sec. 2C:11-3; Pa. Cons. Stat. Sec. 9711(c); Tenn. Code Ann. Sec. 39-2-203.

[4]Statutes so placing the burden, and thus not directly effected by the issue posed in this case, include Ark. Stat.

817-819 (11th Cir.) cert. denied ____ U.S. ____, 78 L.Ed.2d 176 (1983); Tichnell v. State, 287 Md. 695, 729-30, 415 A.2d 830 (1980); State v. Wood, 648 P.2d 71, 83 (Utah, 1982); Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981); Comment, Tichnell v. State - Maryland's Death Penalty: The Need for Reform," 42 Md.L.Rev. 875 (1983). See also Smith v. North Carolina, supra, and Lockett v. Ohio, 438 U.S. 586, 609, n.16 (1978) (issue raised but not decided). This Court has passed on neither question.

Those questions come together in this case, for the Maryland Statute, Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413, as implemented by Maryland Rule 772A, not only places the burden on the capital defendant "to convince [the sentencer] that mitigating circumstances outweigh[] the aggravating circumstances," Tichnell v. State, 290 Md. 43, 61, 427 A.2d 991 (1981), but further requires the sentence of death once the bare existence of a statutory aggravating factor is established if the defendant fails to meet his burden of proof and persuasion. The decision below holds in effect that Maryland may constitutionally require the sentence of death in circumstances where the sentencer is unconvinced that death is the appropriate punishment.

Ann. Sec. 41-1302(1) (beyond a reasonable doubt); Cal. Penal Code Sec. 190.1; N.C. Gen. Stat. Sec. 15-A-2000; Ohio Rev. Code Ann. Sec. 2929.03 (d)(1); Pa. Cons. Stat. Sec. 9711(c); Tex Code Crim. Pro. Art. 37.071 (beyond a reasonable doubt); Wash. Rev. Code Chapter 10.95.060.

Petitioner will contend in this Court that that proposition is at odds with this Court's repeated insistence that State procedures assure "reliability in the determination that death is the appropriate punishment in specific case."

Petitioner submits that it is principally the allocation of the burden of proof which, in conjunction with the other features of the Maryland scheme, which, this case attests, renders it susceptible to random sentences of death. A number of authorities have considered whether the Eighth and Fourteenth Amendments require allocation of the burden of proof on the prosecution on the question of whether death is appropriate, and if so what the standard must be.[5] Ford v. Strickland, 696 F.2d. 804, 817-819 (11th Cir.) cert. denied, ___ U.S. ___, 78 L.Ed.2d 176 (1983); Tichnell v. State, 287 Md. 695, 729-30, 415 A.2d. 830 (1980), cert. denied, ___ U.S ___, 80 L.Ed.2d 846 (1984); State v. Wood, 648 P.2d 71, 83 (Utah, 1982); Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981); Comment, "Tichnell v. State Maryland's Death Penalty: The Need for Reform", 42 Md.L.Rev. 875 (1983). See also Smith v. North Carolina, supra, and Lockett v. Ohio, 438 U.S. 586, 609, n.16 (1978)

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[5]Statutes so placing the burden, and thus not directly affected by the issue posed in this case, include Ark. Stat. Ann. Sec. 41-1302(1)(beyond a reasonable doubt); Cal. Penal Code Sec. 190.1; N.C. Gen. Stat. Sec. 15-A-2000; Ohio Rev. Code Ann. Sec. 2929.03 (d)(1); Pa. Cons. Stat. Sec. 9711(c); Tex. Code Crim. Pro. Art. 37.071 (beyond a reasonable doubt); Wash. Rev. Code Chapter 10.95.060.

(issue raised but not decided). This Court has not passed on the question.

The Maryland Statute, Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413, as implemented by Maryland Rule 772A, not only places the burden on the capital defendant "to convince [the sentencer] that mitigating circumstances outweigh[ ] the aggravating circumstances," Tichnell v. State, 290 Md. 43, 61, 427 A.2d, 991 (1981) cert. denied, ___ U.S. ___, 80 L.Ed.2d 846 (1984), but further requires the sentence of death once the bare existence of a statutory aggravating factor is established if the defendant fails to meet his burden of proof and persuasion. The decision below holds in effect that Maryland may constitutionally require the sentence of death in circumstances where the sentencer is unconvinced that death is the appropriate punishment. These decisions are inconsistent with this Court's repeated insistence that that State procedures assure "reliability in the determination that death is the appropriate punishment in specific case." Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 255 (1983); Gardner v. Florida, 430 U.S. 349, 363 (1977) (White, J., concurring); Lockett v. Ohio, 438 U.S. 586 (1978), Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The Maryland Statute requires the court or jury, as the sentencing body, to consider first "whether, beyond a reasonable doubt, any of the [ten enumerated][6] aggravating

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[6](1) The victim was a law enforcement officer who was

circumstances exist." Sec. 413(d). Once the existence of at least one aggravating circumstance is found, the sentencing body "shall then consider whether, by a preponderance of the evidence, any of the following mitigating circumstances exist: ..." Sec. 413(g).[7] If no mitigating circumstance

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murdered while in the performance of his duties.
(2) The defendant committed the murder at a time when he was confined in any correctional institution.
(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
(5) The victim was a child abducted in violation of Section 2 of this article.
(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.
(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.
(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.
(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.

[7](1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a hangun in the commission of a felony or another crime of violence.
(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.
(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substan-

is proven to exist by a preponderance of the evidence, the sentencer enters the word "Death" on the sentencing form. Sec. 413(h)(2); Maryland Rule 772A(d). If mitigating circumstances are found to exist, the court or jury must then "determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances." Sec. 413(h)(1). If the answer is negative, "the sentence shall be death." Sec. 413(h)(2); Maryland Rule 772A(d).

Maryland law, therefore, differs dramatically from the statutes of the majority of the States which permit the jury or judge to return a life sentence even where no

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tial as to constitute a complete defense to the prosecution.
(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.
(5) The youthful age of the defendant at the time of the crime.
(6) The act of the defendant was not the sole proximate cause of the victim's death.
(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.
(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case

"mitigating circumstances" are found[8] or which place upon the prosecution the ultimate burden of persuasion on the question of life or death, in some instances beyond a reasonable doubt.[9] Indeed, the Maryland Statute requires no independent assessment of whether death is appropriate under all the circumstances[10], an issue not necessarily resolved by the mechanical parsing of aggravating and mitigating factors. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d. 1134, 1144 (1983). A jury may be unpersuaded that the crime itself warrants death; it may be unable to articu-

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[8]Ala. Code Secs. 13-11-1 to 9; Del. Code tit. 11, Sec. 4209; Fla. Stat. Annot. Sec. 921.141; Ga. Code Annot. Sec. 27-2302; Ind. Code Ann. Sec. 35-50-2-9; Ky. Rev. Stat. Sec. 532.025 to .075; La. Code Crim. Pro. Ann. Arts. 905-905.9; Mo. Ann. Stat. Secs. 565.006 to .016; Neb. Rev. Stat. Secs. 29-2519 to 2525; Nev. Rev. Stat Sec. 175.552 to 562; N.H. Rev. Stat. Sec. 630.5; N.M. Stat. Secs. 31-18-14, 31-20A-1 to 6; N.C. Gen. Stat. Secs. 15 A-2000 to 2003; Okla. Stat. tit. 21, Secs. 701.10 to .15; S.C. Code Secs. 16-3-20 to 28; S.D. Cod. Laws Secs. 23A-27A-1 to 47; Va. Code Ann. Secs. 19.2-264.2 to .5; Wyo. Stat. Secs. 6-4-102 to 103.

[9]See Footnote 2, supra.

[10]Ark. Crim. Code, Secs. 41-1301; Miss. Code Ann. Secs. 79-19 (construed in Coleman v. State, 378 So. 2d 640 (Miss. 1979); N.C. Gen. Stat. Sec. 15A-2000(b)(1); Utah Code Secs. 763-206 to 207 (construed in State v. Wood, 648 P.2d 71, 83) (Utah 1982).

late those "compassionate ... factors stemming from the diverse frailties of humankind," Woodson, 428 U.S. at 304; because of the applicable standard of proof and its placement, the jury may be uncertain or even guessing as to whether death is the appropriate punishment in the specific case. In Maryland, that jury is nonetheless obliged to impose death unless the rigid formula be satisfied.

Justice Stevens stated the matter succinctly in his opinion respecting the denial of certiorari in Smith v. North Carolina, ___ U.S. ___, 74 L.Ed. 2d. 622 (1982), in which a literal reading of a sentencing instruction was perceived as mandating "two entirely separate inquiries:"

> First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case." Lockett, supra, 438 U.S., at 601, (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
>
> A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In State v. Wood, 648 P.2d. 71, 83 (Utah 1982), that court wrote:
>
> "It is our conclusion that the appropriate standard to be followed by the sentencing

authority--judge or jury--in a capital case is the following:

> 'After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.'

These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors. Not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances." (Emphasis added) [Id. at 622][11]

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[11]The apparent reasons for denying certiorari in Smith are not present here. Unlike the instruction at issue in Smith, which could be interpreted unobjectionably, there is nothing ambiguous about the Maryland law. It requires the very analysis found questionable by Justice Stevens, and on its face it forecloses the "slight changes in the form of ... instructions" which were suggested in Smith. Id. at 623. Postconviction proceedings will in no way develop the issues here posed.

In perhaps no other area of the law has the need for reliability in the decisional process been stressed as it has been in the capital punishment context. In other areas where this Court has perceived a need to minimize the risk of error in the adjudicatory process, it has not hesitated to place a heightened standard of proof upon the party seeking to change the status quo. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. (1979); In Re Winship, 397 U.S. 358 (1970). The Maryland scheme, however, permits the capital sentencing decision to be made on the basis of the "preponderance of evidence standard," which "by its very terms demand[s] consideration of the quantity, rather than the quality of evidence," Santosky, 455 U.S. at 764, and "is quite consistent with want of belief," Trickett, "Preponderance of Evidence and Reasonable Doubt," 10 Dick.L.Rev. 76 (1906). Moreover, it places the ultimate burden of both production and persuasion on the capital defendant, who must be executed if he fails in that regard.[12]

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[12]Thus if, not improbably, the sentencer finds the evidence to be equally balanced ---- i.e. simply does not know whether mitigating circumstances outweigh aggravating circumstances ---- it must impose death. The fact that the defendant must succeed in meeting two separate burdens (showing the existence of the factors and then that they outweigh aggravation, both by a preponderance) clearly exacerbates the problem. If one defines preponderance of the evidence as, for example, representing 51 percent likelihood of correctness, then the likelihood that two successive decisions made on the basis of preponderance of the evidence would be correct is equal to .51 multiplied by .51 or 26.01%: i.e., it is more likely than not that under these conditions the overall decision is incorrect. See M. Moroney, Facts from Figures 8-11 (Repr. 1976).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the court below.

Respectfully submitted,

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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

APPENDIX

OPINION BELOW:

Derrick Quinton White v. State, 300 Md. 719, 481 A.2d 201 (1984)..... App. 1

IN THE COURT OF APPEALS OF MARYLAND

Nos. 20 and 82

September Term, 1982

DERRICK QUINTON WHITE

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch,
JJ.

Opinion by Rodowsky, J.
Cole and Davidson, JJ., dissent

Filed: September 13, 1984

App. 1

Derrick Quinton White (White) was convicted by a jury in the Circuit Court for Baltimore County of capital murder and other offenses. The jury also determined that the sentence should be death. On this consolidated appeal and sentence review pursuant to Md. Code (1957, 1982 Repl. Vol.), Art. 27, § 414 we shall affirm both the verdict and the sentence.

On August 14, 1981 White, then age 18, shot and killed Victor Joseph Furst (Furst), age 61, during an attempt to rob Furst of the moped he was riding. The State proved the following facts, in large part through White's accomplice, Gerard Eugene Anthony (Anthony), also age 18.

White and Anthony each lived on the west side of Baltimore City. They had known one another for about two months prior to the murder. Neither was employed. They had discussed getting some money illegally. On the morning of August 14 Anthony took his father's loaded revolver from their home and met White nearby. Anthony put the gun in the glove compartment of the red 1981 Pontiac T1000 which White had been driving. With Anthony at the wheel of the car, they drove into western Baltimore County. White directed them to a 7-11 store at Rolling Road and Route 40 West which they intended to rob. With White in possession of the gun, they entered the store; but it was too crowded and they left.

Anthony resumed driving with White in the front passenger seat giving directions to another store in the vicinity to rob. On their way they drove by Furst who was riding a new moped in the opposite direction. White told Anthony that it was a good model moped, that an old man was riding it and that they were

App. 2

going to get it. Anthony said they should forget about the moped and "go to the money." White persisted and said that the moped would fit in the back of the Pontiac. Anthony turned the car around. They pursued the man on the moped and caught up to him in the 7400 block of Dogwood Road.

As Anthony drove abreast of Furst, White pointed the gun out of the window on the passenger side at Furst. About five seconds later White fired, as Furst was turning his head away from the gun. Anthony immediately accelerated leaving Furst and the moped lying alongside the road. When Anthony asked "what the hell did he do that for," White said that "[Furst] looked like he wasn't going to stop." Furst died of a single gunshot wound which entered his chest from left to right and pierced the aorta.

Within one-half hour of the shooting the murderers were arrested nearby, in the Pontiac. Occupants of a car which had be proceeding toward the scene at the time of the crime described th red car and gave partial descriptions of its driver and passenger At the time of arrest, the handgun, with one spent cartridge in the chamber and five live rounds in the cylinder, was recovered from the floor of the front passenger seat occupied by White.

White took the stand at the guilt or innocence phase of the proceedings, although he declined to testify at the sentencing phase. He denied being with Anthony at the time of the murder. White's story was that he had met Anthony and another youth, known to White only as "Tony," in Baltimore City and had gotten a ride with them in Anthony's car to a pizza parlor in western Baltimore County where White unsuccessfully applied for a job.

App. 3

When Anthony returned sometime later to drive White back into the city, Tony was no longer in the car and Anthony told White that they had "popped" someone.

I

Before addressing appellant's points, we must decide whether there is a final judgment. Section 414(a) provides that "[w]henever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record." Under subsection (d) any appeal from the verdict is consolidated in this Court with the sentence review.

The State charged White, separately from Anthony, in a five-count criminal information alleging murder in the first degree, attempted robbery, use of a handgun in the commission of a crime of violence, unauthorized use of the Pontiac[1] and possession of marijuana.[2] The jury found White guilty on each count and, in response to a special interrogatory, also found that White shot and killed Furst in an attempt to rob Furst of his property. As reflected by the docket entries, the court subsequently granted a motion for judgment of acquittal on the unauthorized use count. Approximately six weeks after the jury had determined the sentence of death on count one, White's motion for a new trial was heard, and overruled. Thereupon the circuit court signed a death warrant, execution of which was immediately stayed. No sentence was imposed on the other counts.

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[1]The car had been stolen in June of 1981 from a new car dealer.

[2]Five marijuana cigarettes were found in White's pocket when he was arrested.

App. 4

The charge of attempted robbery merged into the murder conviction. *See State v. Frye*, 283 Md. 709, 393 A.2d 1372 (1978); *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977). The handgun charge, however, did not merge. *See* Art. 27, § 36B(d) and *Whack v. State*, 288 Md. 137, 416 A.2d 265 (1980), *appeal dismissed*, 450 U.S. 990, 101 S. Ct. 1688, 68 L. Ed. 2d 189 (1981). Nor did the marijuana charge. As to the offenses other than murder the docket entry in relevant part reads: "No Sentence imposed as to Balance of Counts. Court costs waived. Commit sent." We interpret this docket entry to mean that sentence was suspended generally on the handgun and C.D.S. possession counts.

Under these circumstances, Md. Code (1974, 1984 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article (Courts Article) applies. Its last sentence specifies that "[i]n a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended." And *see Lipscomb v. State*, 223 Md. 599, 601, 165 A.2d 918, 920 (1960). We hold that the judgment in this case has become final, within the meaning of Art. 27, § 414(a) as well as under § 12-301 of the Courts Article so that this Court has jurisdiction to proceed.

II

A

The first of appellant's challenges to the guilty verdict attacks the denial of his challenge for cause to a prospective juror, John J. Cardarelli (Cardarelli). After a voir dire in open court, in which the relatively standard questions in any criminal case had been asked, the prospective jurors were individually

App. 5

questioned in chambers concerning their attitudes toward the death penalty. During his individual voir dire Cardarelli volunteered that he thought police officers could persuade him over someone who had been accused of a crime. His answers to further questioning by the State convinced the trial judge that Cardarelli was not disqualified for bias, so that White's motion to strike Cardarelli for cause was denied.

After the better part of two days a pool of fifty eligible jurors had been assembled. As the court called individual talesmen to the box the parties exercised their peremptory challenges, ten for the State and twenty for White. *See* Maryland Rule 753 a 1.[3] When twelve talesmen had cleared the first round of peremptory challenges, the State had utilized five of its strikes and White ten of his. Two alternate jurors were then selected, a process for which additional peremptory challenges are allowed, *see* MD. R. 753 a 3, and with which we are not concerned here.

The parties then, per Rule 753 b 4, began the exercise of their remaining peremptory challenges against the prospective jurors who were in the box and against those called forward from the general body of veniremen as substitutes. During this process Cardarelli was called forward and White used his thirteenth peremptory challenge to exclude Cardarelli. When the State had exercised eight peremptories and White nineteen, the following colloquy took place:

> THE COURT [addressing White's counsel]:
> And then you have one more peremptory challenge that you may exercise at this time as to the twelve jurors.

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[3]All references are to the Maryland Rules of Procedure as they existed immediately prior to the revision effective July 1, 1984.

App. 6

[WHITE'S COUNSEL]: I'll not exercise, Your Honor.

THE COURT: All right.

[WHITE'S COUNSEL]: Jury panel[']s acceptable as constituted. I still have one challange to the alternate.

The State then struck the talesman in seat No. 6, White exercised his last peremptory to exclude the first substitute called and the No. 6 seat was filled by the next person from the list. The State used its last peremptory against prospective juror No. 3 and another person was seated there. Counsel for White gave no indication that he would have used a peremptory challenge against either of the last two jurors seated if the defense still had a strike to exercise.

Just before the jury was sworn the court addressed defense counsel.

> [D]o you have any objection you wish to register, you have made an objection when the Court has excused or failed to excuse a juror for cause. That's already on the record. Do you have any objection to the proceeding by which this jury was empaneled. I tried to honor everybody's wishes.
>
> [WHITE'S COUNSEL]: No, I have no objection to any of that. *My only objection* would be that I felt Harris should have been called, if you insist she be struck for cause. [Emphasis added.]
>
> THE COURT: The record clearly indicates that Vanessea Harris was challenged for cause. It was done over your objection.
>
> [WHITE'S COUNSEL]: Yes, Your Honor.

Clearly the claimed bias of Cardarelli did not influence the verdict because Cardarelli did not serve on the jury; but White

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used a peremptory challenge to keep Cardarelli off the jury and White exhausted all of his strikes before the jury was sworn. Nevertheless, even if we assume error in not striking Cardarelli for cause, White is not entitled to a new trial because the assumed error is waived.

If disqualification for cause is improperly denied, but the accused has not exercised all allowable peremptory challenges, there is no reversible error. *See Parker v. State*, 227 Md. 468, 471, 177 A.2d 426, 428 (1962) ("[W]e think it is clear that the defendant (who had not exhausted his challenges) was not prejudiced."); *Thomas v. State*, 50 Md. App. 286, 437 A.2d 678 (1981), *cert. denied*, 292 Md. 639 (1982); *Earhart v. State*, 48 Md. App. 695, 429 A.2d 557 (1981); *McCree v. State*, 33 Md. App. 82, 363 A.2d 647 (1976).

We have also held that a claim of error in the denial of a challenge for cause was waived by defense counsel's announcing satisfaction with the jury after all peremptory challenges had been exhausted. *See Calhoun v. State*, 297 Md. 563, 579-80, 468 A.2d 45, 52 (1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 2374, 80 L. Ed. 2d 846 (1984) and Joint Record Extract, Vol. V at 709-26, *Calhoun v. State*. Defense counsel's affirmation of the acceptability of the jury has been held to waive a challenge to an array which was not selected from voting lists, *Glover, Robinson & Gilmor v. State*, 273 Md. 448, 330 A.2d 201 (1975), and to waive objection to a panel which had overheard prejudicial remarks, *Newsbaum v. State*, 156 Md. 149, 143 A. 872 (1928), but not to waive the right to

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obtain review of the denial of a request to inspect the prosecution's dossier on the veniremen, *Cowser v. State*, 282 Md. 125, 38 A.2d 389, *cert. denied*, 439 U.S. 852, 99 S. Ct. 158, 58 L. Ed. 2d 156 (1978).

Appellant places principal reliance on *Tisdale v. State*, 30 Md. App. 334, 353 A.2d 653 (1976), which held that counsel's expressed satisfaction with the jury did not waive the claim of error in rejecting a challenge for cause. That result contradicts and is superseded by this Court's later holding in *Calhoun*.

Citing *Lockhart v. State*, 145 Md. 602, 125 A. 829 (1924), appellant in effect says that the erroneous refusal to strike for cause always requires reversal when peremptory strikes are thereafter exhausted because the ruling of the court reduces the defendant's allotment of peremptory challenges. *Lockhart*'s holding, however, illustrates that the rule which White advocates is not universal. In that case the trial judge had announced that the parties would not be held strictly to the statutory limit of four peremptories. All parties took substantial advantage of this judicial generosity. Eventually the court had to reinstate the limit in order to bring jury selection to a close. By that route the defendants exhausted their peremptory strikes. On appeal thi Court concluded that error was committed in refusing a strike for cause but held that reversal was not required on a combined waive and harmless error rationale. We said (*id.* at 620-21, 125 A. at

> It is clear that [the defendants] could not reasonably complain of the irregular method, thus accepted, by which [the enlargement of their challenged rights] was accomplished. If the legal right of

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> the defendants to the use of peremptory challenges had been actually reduced by any of the trial court's rulings, we should not require affirmative proof of resulting injury as a condition of reversal. But when it appears that in consequence of an extraordinary procedure, conducted with their assent, the defendants had the use of peremptory challenges beyond the legal limitation, apart from the one expended for the exclusion of the talesman who should have been excused for cause, and when for that reason no restrictive effect upon their legal rights can be attributed to the ruling found to be erroneous, the fact that the record does not suggest to us any reason to doubt the competency or impartiality of any member of the trial jury as finally impanelled is a material consideration supporting the view that the error is not reversible.
>
> In view of the special conditions described, we would not be justified in reversing the judgment and awarding a new trial upon the theory that the rights of the defendants in regard to the selection of the jury were injuriously restricted.

More recently, *King v. State Roads Comm'n*, 284 Md. 368, 396 A.2d 267 (1979) dealt with an error which affected peremptory challenges. The litigants in that civil case had been furnished a list of twenty-five veniremen from which to exercise their four strikes respectively, rather than a list of twenty as required by rule. Thereafter the judge struck five names. In remanding to determine whether the error had been waived by failure to object, we said that

> the importance of the peremptory challenge requires that any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice. *Swain v. Alabama*, [380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759, 772 (1965).] [284 Md. at 371, 396 A.2d at 269.]

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In the case at bar the defense expressly accepted the panel when it included ten of the twelve jurors who actually served. After White's peremptories were exhausted, the membership of the panel changed by two. After those two persons were seated and before the jury was sworn, the court invited objections to the proceeding by which the jury was impaneled. Defense counsel told the court he had none. He further told the court that his "only objection" related to the *exclusion* of a prospective juror for cause, even though the court had pointed out that objections to excusing or failing to excuse a juror were already on the record, and, in effect, need not be repeated. Counsel's voluntary limitation on objections made to jury selection, coupled with his having shortly before pronounced as acceptable the jury as then constituted, demonstrate the defense's continued satisfaction with the panel and acceptance of the jury that served. Therefore, any error in denial of the challenge for cause was waived. The substance of the statements and their effect in this case are the same as in *Calhoun v. State*, *supra*.

B

White next argues that a letter from him to the accomplice, Anthony, should not have been admitted into evidence because of a discovery violation by the State.

Anthony testified for the State. Defense counse cross-examination by emphasizing Anthony's plea agreement and release on bail. On redirect the State introduced the written plea agreement, which contained a promise by Anthony to testify truthfully. Seizing that provision as an excuse for recross-

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examination, White's counsel produced a letter from Anthony to White in which Anthony in part said that he would not let White "get burned, unless I can [*sic*] help it ...." Counsel suggested that this meant that Anthony and not White had killed Furst. Anthony denied the suggestion and testified that White had telephoned him to urge that he not cooperate with the State. Anthony's letter to White refers to that telephone conversation and also to a letter written by White to Anthony. On re-redirect the State was permitted, over objection, to introduce the letter. In it White urges Anthony to decline to cooperate with the police if requested to do so. ("If they come at you with some Mickey Mouse shit, tell them to kiss your ass. O.K.[?]").

Counsel's objection at trial which White argues here is that "the State did not apprise me on my motion for discovery that they had such a letter ...." About one week before trial Anthony told the prosecutor about the letter, but the State did not have possession of it until the morning on which Anthony testified.

MD. R. 741 controls. In relevant part it reads:

> a. *Disclosure Without Request.*
>
> Without the necessity of a request by the defendant, the State's Attorney shall furnish to the defendant:
>
> ....
>
> 2. Any relevant material or information regarding: (a) specific searches and seizures, wire taps and eavesdropping, (b) the acquisition of statements made by the defendant, and (c) pretrial identification of the defendant by a witness for the State.
>
> 3. The State's Attorney's obligations under this section extend to material and information in the possession or control of

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> members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.
>
> b. *Discovery by the Defendant.*
>
> Upon the request of the defendant, the State shall:
>
> 1. Witnesses.
>
> Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony.
>
> 2. Statements of the Defendant.
>
> As to all statements made by the defendant to a State agent which the State intends to use at a hearing or trial, furnish the defendant: (a) a copy of each written or recorded statement and (b) the substance of each oral statement and a copy of all reports of each oral statement.

Appellant's objection is in substance that the State failed to furnish him with a copy of his letter to Anthony. Discovery of copies of statements is governed by MD. R. 741 b. But the State is not required to produce a copy of a statemmnt by the defendant unless it was made to a State agent and is one which the State intends to use at a hearing or trial. MD. R. 741 b 2. Here Anthony, to whom the letter was written, was not a State agent. Further, White has not demonstrated that the letter was one which the State intended to use at trial. Our reading of the record indicates that the relevance of the letter arose fortuitously after the State had concluded its direct and redirect examination of Anthony. *See State v. Parker*, 416 So. 2d 545 (La. 1982); *People v. Goodson*, 57 N.Y.2d 828, 442 N.E.2d 54, 455 N.Y.S.2d 757 (1982).

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Without mentioning Rule 741 b 2, White pitches his argument directly on Rule 741 a 2, which has no application. The "statements made by the defendant," which are embraced within MD. R. 741 a 2, are statements made to a State agent which the State intends to use at trial. This is clear from the relationship of Rule 741 a 2 to Rule 736, dealing with motions before trial. Section a of the latter rule provides in relevant part:

> a. *Mandatory Motions.*
>
> A motion asserting one of the following matters shall be filed in conformity with this Rule. Any such matter not raised in accordance with this Rule is waived, unless the court, for good cause shown, orders otherwise:
>
> ....
>
> 4. An unlawfully obtained admission, statement or confession[.]

Rule 741 became effective July 1, 1977. It was part of the revision of Ch. 700 (Criminal Causes) proposed by the Fifty-Third Report of the Rules Committee. Records of the Rules Committee reflect that the purpose of Rule 741 a 2 is to force the defendant to file certain motions before trial, including a motion to suppress an unlawfully obtained statement.

Prior to the 1977 revision, Rule 728 governed discovery in criminal causes and that number was initially utilized for the proposed revised discovery rule during Rules Committee deliberations. At the full committee meeting of February 1-2, 1974, the subcommittee on the revision of Ch. 700 was requested to redraft its then proposed Rule 728 in order to utilize language in the report of a joint committee of the Maryland Judiciary and of the

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> the defendant, and (3) pre-trial identification of the defendant by a witness for the State. Information required by this section may be furnished by the State without a request from the defendant.

Within the Rules Committee the proposed new criminal rules were referred to a style committee whose draft would become the Rules Committee's working draft for final review prior to submission to this Court. Minutes of the Rules Committee meeting of September 12-13, 1975 reflect the following concerning Rule 728.

> Section b of this rule was designed to allow the State at its option to furnish the defendant with relevant material or information that would force the defendant to file a motion to suppress, prior to trial. The Style Committee questioned whether the committee desired to allow the State to do this at its own election or whether it should be mandatory. The committee voted that the section should be mandatory.

In a draft circulated October 10, 1975 Rule 741 a 2 emerged from the Style Committee in a form very near that in which it was adopted by this Court. This draft renumbered the discovery rule to 741 and, in relevant part, read:

> 741. DISCOVERY AND INSPECTION.
>
> a. Disclosure Without Request
>
> The State shall, without the necessity of a request by the defendant, furnish to the defendant:
>
> ....
>
> 2. Any relevant material or information regarding: (a) specific searches and seizures, (b) the acquisition of statements made by the defendant.

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Maryland State Bar Association on ABA Standards of Criminal Justice.

Section 2.3 of the American Bar Association's Standards Relating to Administration of Criminal Justice, Discovery and Procedure Before Trial (1970) in relevant part read that

> the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection ... of any relevant material and information regarding:
>
> (a) specified searches and seizures [and]
>
> (b) the acquisition of specified statements from the accused[.]

In its commentary accompanying publication of Section 2.3 the ABA explained how

> [s]ubsections (a) and (b) deal with the circumstances under which searches and seizures were made and statements were taken from the accused, matters which may affect the admissibility of evidence if law enforcement agents acted illegally.

By the time of the Rules Committee meeting of March 14-15, 1975, three paragraphs of proposed new Rule 728 dealt with discovery to be furnished by the State to the accused. Paragraph a, captioned "Matters Discoverable by the Defendant," listed matters to be furnished by the State upon request. Paragraph c, captioned "Mandatory Disclosure," was limited to exculpatory material. Relevant here is proposed ¶ b, entitled "Discovery as the basis for a motion to suppress," which read:

> The State shall furnish the defendant with any relevant material or information regarding (1) specific searches and seizures, (2) the acquisition of statements made by

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and (c) pretrial identification of the defendant by a witness for the State.

This process produced a rule under which material or information dealing with the circumstances in which a statement was obtained from the accused by a State agent was to be automatically produced by the State, in order to trigger the running of the time for filing a motion to suppress, while the statement made to the State agent was producable only on request by the accused.

Disclosures required by Rule 741 a 2 must be made by the State within 25 days after the earlier of the appearance of counsel or the first appearance, pursuant to Rule 723, of the defendant. *See* MD. R. 741 a 1. The accused is then required to file the Rule 736 a mandatory motions within five days thereafter, or within five days after discovery is furnished. *See* MD. R. 736 b. Because statements made to third parties who are not State agents cannot ordinarily be the subject of a motion to suppress on the ground that they have been unlawfully obtained, they are not within the ambit of disclosure required by Rule 741 a 2.

There was no violation of Rule 741 by the State. Consequently we do not reach the question of whether the trial court abused its discretion by not excluding the letter from evidence as a sanction for the claimed violation.

C

The final contention bearing on the verdict involves denial

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of a mistrial. During the defendant's case a prisoner at the Baltimore County jail, Anthony Brown (Brown), testified that the accomplice, Anthony, had said he would not let White "burn" for something White had not done. The prosecutor opened his cross-examination by asking, "Now, Mr. Brown, you're over in the Baltimore County Jail awaiting trial on another murder charge, aren't you?" Objection was sustained and the court, *sua sponte*, immediately instructed the jury as follows:

> THE COURT: He has testified he's in jail. It doesn't make any difference what he's in jail for.
>
> He could be there for non-support or a more serious crime, and I want the jury to completely put out of their minds and completely disregard any statement or any question as to what he's there for.

White's motion for mistrial was denied at that point.

After the State had cross-examined Brown, the judge again instructed the jury, saying:

> In weighing the testimony of the last witness, Anthony Brown, I charge you to completely disregard any reference to the reason that the witness is now in the Baltimore County Jail. That should not be considered one iota. Put it out of your mind and ignore it, because any reference to why he is being held there now does not relate to a conviction for a crime of moral turpitude.

Appellant argues that we should conclude that the experienced prosecutor acted in bad faith and that the instructions by the court could not effectively cure the damage, so that a mistrial was the only appropriate response.

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The grant or denial of a mistrial is necessarily left to the discretion of the trial judge, and our review is limited to whether there has been an abuse of discretion in denying the motion. *See Poole v. State*, 295 Md. 167, 183, 453 A.2d 1218, 1227 (1983); *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714-15 (1974). In light of the trial court's prompt and firm intervention, we see no abuse of discretion in denying a mistrial.

III

In this part we address the assignments of error relating to the sentencing proceeding and the death sentence.

The jury which had on Wednesday, February 24, 1982 found White guilty returned on Friday, February 26 for the sentencing proceedings. The only aggravating factor present was that the murder had been committed while White was attempting to commit robbery. There were two mitigating factors. The first was the absence of any conviction for a crime of violence. This finding was instructed by the court which interpreted "crime of violence" as used in Art. 27, § 413(g)(1) to exclude determinations of juvenile delinquency based on the commission of a crime of violen The jury also determined that White's environment mitigated.

A

White was 18 years and 4 months' old when he killed Furst. This chronological age, appellant urges, requires finding "[t]he youthful age of the defendant" as a mitigating factor. Sec. 413(g)(5).

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Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984) has rejected a pure chronological age approach to the "youthful age" mitigating factor. In that case we considered prior criminal conduct, home environment, marital status, degree of maturity, and alcohol and drug abuse, among others, as factors relevant to the concept of "youthful age."

White's juvenile record started at age 13 and is summarized below.

Date of Offense	Offense	Disposition
July 23, 1976	Breaking and entering	Probation
October 10, 1976	Breaking and entering	Probation
October 21, 1976	Breaking and entering	Probation
February 25, 1977	Breaking and entering	Probation
August 31, 1977	Robbery (apparently purse snatching)	Committed to Juvenile Services Administration - Institutions
February 1, 1978	Six counts involving a single victim. Charges include robbery with a dangerous and deadly weapon	Commitment to Juvenile Services Administration for placement

On February 27, 1980 White was committed to the Baltimore City jail on a charge of burglary on which he was convicted on July 7, 1980. That same day a sentence of five years was imposed. He was paroled June 5, 1981.

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White has completed 11 grades of school. His brother describes him as having run with a crowd which frequented disco nightclubs. He apparently had a few girl friends, by one of whom White fathered a son who was born after the trial.

Our test for determining whether a sentencing authority erred in failing to find a mitigating factor is whether "*any* rational sentencing authority could have concluded that the accused failed to prove the claimed mitigating circumstance by a preponderance of the evidence." *Stebbing v. State*, *supra*, 299 Md. at 362, 473 A.2d at 918 (emphasis in original). Here, under the facts reviewed above, the jury could rationally have concluded that youthful age was not a mitigating factor.

B

A parole agent testified for the State at the sentencing phase that White was paroled on June 5, 1981 and had come under the witness' supervision on August 5, 1981. Appellant seems to assume that the testimony can only be relevant to the mitigating circumstance listed in § 413(g)(7), *i.e.*, that "[i]t is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." As appellant sees it, the testimony was not admissible to negate that mitigati circumstance because White had not affirmatively put on any proof and had not argued, that the jury should find the mitigating circumstance applied to him.

First, it is appropriate for a sentencing authority in any criminal case to consider that the offense for which the defendan

is to be sentenced was committed while the defendant was on parole or probation involving another offense. Maryland's capital murder statute provides for the admissibility in the sentencing proceeding of "[a]ny other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements." Sec. 413(c)(1)(v). And *see Johnson v. State*, 292 Md. 405, 442-43, 439 A.2d 542, 562-63 (1982); *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983). This provision includes the proof challenged here.

Secondly, proof that White was on parole at the time of the murder is relevant to the mitigating circumstance dealing with the unlikelihood of further criminal activity that would constitut a continuing threat to society. It is not necessary for one convicted of capital murder first to introduce evidence, or to argue, in support of finding this mitigating circumstance before the State may properly introduce evidence opposing such a finding. The issue is injected into the sentencing phase from its beginning because the special verdict at the guilt phase found an aggravatin factor, and § 413(g) mandates that the jury consider each of the statutorily enumerated possible mitigating circumstances. MD. R. 772A implements this mandate by specifying the form to be utilized by the sentencing authority and that form presented the subject mitigating circumstance for consideration. To say that the subjec possible mitigating circumstance is not an issue in the sentencing phase unless the convicted capital murderer invokes it would lead to the absurd consequence that, absent affirmative evidence or argument from the defendant, the court could instruct a sentencing

jury that it could not find this mitigating factor to apply.

Alternatively, White contends that the proof of the date on which he was paroled, coupled with the court record furnishing the date on which the five-year sentence was imposed, enabled the jury to calculate that White had been paroled eleven months into a five-year sentence and thereby "raise[d] the spectre" that White might not serve his entire sentence. Cases like *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979) are cited in support. The proposition on which appellant relies deals with arguments by the prosecutor to a jury which invite the jury to speculate concerning possible parole, pardon or commutation in the future. The State made no such argument in this case. White's objection to the parole agent testimony was properly overruled.

C

Appellant's brief also presents six arguments which have been rejected in previous decisions by this Court.

1. *Stebbing v. State*, *supra*, rejected the argument that

> THE SENTENCE OF DEATH MAY NOT BE IMPOSED UPON CONVICTION OF FELONY MURDER WHERE THE ONLY AGGRAVATING FACTOR ALLEGED OR FOUND WAS THAT THE MURDER WAS COMMITTED IN THE COURSE OF THE FELONY.

2-4. *Calhoun v. State*, *supra*, rejected the arguments that

> Article 27, sec. 413(d)(10), which permits imposition of the death penalty upon proof that the murder was committed during the commission or attempt to commit a specified felony, is an unconstitutional aggravating factor[; and that]

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> Article 27, sec. 413(c), renders the death penalty in Maryland unconstitutional[; and that]
>
> Article 27, secs. 413 and 414, unconstitutionally restrict the discretion of the finder of fact in determining whether the death penalty should be imposed.

5-6. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980) rejected the arguments that

> [t]he statute unconstitutionally places the burden of proof to show mitigation on the accused[; and that]
>
> [t]he imposition of the death penalty violates Articles 16 and 25 of the Maryland Declaration of Rights.

IV

We now address the proportionality review mandated by § 414. As a threshold matter appellant says that his case must be approached with "heightened scrutiny" because of the comment by the trial judge in his report which is required by MD. R. 772A. The rule calls for a recommendation as to whether the jury's imposition of death was justified. In this case the judge said it was "[q]uestionable in [his] mind because of absence of direct proof of specific intent to kill."

We agree that the inclusion of the recommendation in a trial judge's report was intended to flag those cases in which the presiding judge disagreed with a jury's determination of death, and we approach the review here cognizant that the very experienced trial judge considered the jury's determination to be "[q]uestionable." We also observe, however, that the court instructed the

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jury in this case on both premeditated and felony murder, that the State argued both premeditated and felony murder to the jury and that the jury returned a general verdict of guilty of first degree murder. Under the evidence and instructions, that verdict includes a finding of premeditated murder, even though, under the special interrogatory, the jury also found felony murder.

When we undertake to match the instant case with other capital murder cases which have been presented to a sentencing authority under Maryland's current death penalty statute, we find that this murder is almost unique. There seems to be no other case in the inventory in which the killer by pure chance passed by the victim on a public street in broad daylight, decided that the victim had some property which the killer coveted and then, without warning, demand, or resistance by the victim, simply killed the victim in cold blood.

The most nearly comparable case is that of JAMES ALEXANDER FIELDS, JR., who was sentenced on October 8, 1982 by the Circuit Court for Prince George's County, Maryland to life imprisonment. On December 31, 1981 two brothers, Jessie Wilson, 70, and the victim, Murray Wilson, 72, parked their vehicle in the parking area in front of a store which Jessie entered to get directions. When Jessie returned to the vehicle Fields was standing by the passenger side punching Murray, who was inside the vehicle. Jessie got into the vehicle, presumably to drive away. Fields produced a handgun and demanded Jessie's wallet. Jessie released the clutch as he reached for his wallet, and the vehicle began

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to roll backward. When Murray shouted, "Run over the black son of a bitch," Fields shot and wounded Jessie, and shot and killed Murray. A jury deadlocked on sentence which resulted in life imprisonment pursuant to § 413(k)(2). This one case does not make White's sentence disproportionate. We must compare it generally to "similar cases."

We can compare this case to those cases in which the aggravating factor is the same, namely, committing or attempting to commit robbery when committing the murder. In this approach we do not include cases in which there were aggravating circumstances in addition to robbery, *e.g.*, rape, sexual offenses, taking of a hostage, killing a law enforcement officer, or multiple murders. Limiting the inventory of comparable cases to those in which a death sentence was sought by the State based on the single aggravating factor of robbery would seem, on balance, not to weight the comparison against appellant. Within this frame of reference, there have been thirteen murder prosecutions tried to conviction. In seven of these the sentencing authority determined the penalty to be life imprisonment; in four the sentencing authority imposed death; and in two the inability of the jury to agree resulted in life sentences under § 413(k)(2).[4]

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[4]We do not include among the thirteen cases selected that of Clinmon W. Ellison, who received a life sentence on January 19, 1983 in the Circuit Court for Baltimore City for the murder on October 23, 1981 of the assistant manager of a K-Mart store. The jury found that no aggravating circumstance had been proved beyond a reasonable doubt. Thus, on the official record the case is not one of capital murder.

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DWAYNE T. MAYERS received a life sentence from a jury in Anne Arundel County on October 22, 1980 for the murder of an elderly woman during a housebreaking and robbery. The jury found mitigating factors preponderated. These were those listed as the first, fourth and fifth factors in § 413(g), namely, the absence of any prior conviction for a crime of violence, diminished capacity and youthful age. BRYAN KEITH QUICKLEY, a 16-year-old, killed the victim during the robbery of a furniture store. A judge of the Circuit Court for Harford County sentenced Quickley to life on November 6, 1980. His findings included, in addition to the first and fifth mitigating factors, "borderline range of intelligence" and the history of an "impoverished ... social and educational environment," as set forth in reports filed in the proceedings. RONALD LEROY JOHNSON was sentenced to life imprisonment on April 8, 1981 by a judge of the Circuit Court for Baltimore County for the murder of a 78-year-old woman during a burglary and robbery. The judge found that Johnson had acted "under substantial duress, domination or provocation of another person." There were no prior crimes of violence, and there was diminished capacity. Life imprisonment was also imposed on GARY ALLEN MILLER by a judge of the Circuit Court for Allegany County on November 16, 1981. The court found that the aggravating factor of robbery was outweighed by the absence of a prior crime of violence, by the victim's participation in the defendant's conduct by diminished capacity and by non-exclusiveness of the defendant's act in proximately causing death. The victim had been beaten and strangled. In his report the trial judge describes the offense,

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in part, by saying:

> Victim exposed himself to danger by reason of his out-of-character association with Defendant and others. He was intoxicated and was carrying considerable cash while frequenting taverns of poor repute. In addition, Defendant said that the victim made homosexual advances toward him.

A Montgomery County jury sentenced JACKIE HUGHES to life imprisonment on March 1, 1982 for a murder committed on a public street during a planned robbery. The victim was a restaurant manager who was on his way to make a bank deposit of business receipts. Although the manager was armed and did shoot and wound Hughes, it appears that Hughes was shot only after he had shot and fatally wounded the victim. The jury found the first statutory mitigating circumstance and on the sentencing form checked that "[o]ther mitigating circumstances exist," but did not specify them. In his report the trial judge advises that statutory factors 1, 4, 7 and 8 could have been considered under the evidence. CURTIS WAYNE MONROE received a life sentence on September 20, 1982 from a judge of the Montgomery County circuit court for the murder of an employee of a security alarm company during a break-in and robbery at a discount store. During that same robbery Monroe's co-felon killed a police officer. *See Calhoun v. State*, *supra*, 297 Md. 363. The sentencing judge found it unlikely that Monroe would engage in further criminal activity threatening to society and that Monroe had been employed, has a wife and two children and was furthering his education. In his report, the judge explained that his primary considerations were comparison to other cases in his circuit court where death had

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been sought but not imposed and comparison of Monroe's case to that of Calhoun. On February 3, 1983 a judge of the Circuit Court for Anne Arundel County sentenced MICHAEL SPENCER ALLEN to life imprisonment for a murder during a gas station robbery. The judge found Allen "clearly suffers from disruptive psychiatri disorders."

In addition to the Fields case, described above, a jury deadlock produced a life sentence for JAMES THOMAS FORTER in the Circuit Court for Anne Arundel County on October 5, 1979.

Of the four murders for which death sentences have been imposed where robbery was the sole aggravating factor, the one which bears more similarity to White's case than do the others is that of DORIS ANN FOSTER. A Cecil County jury convicted her of capital murder and sentenced her to death on April 4, 1984 at a retrial, after this Court had reversed an earlier conviction and death sentence. *See Foster v. State*, 297 Md. 191, 464 A.2d 986 (1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 983, 79 L. Ed. 2d 221 (1984). While we have not reviewed this current sentence, it is presumptively valid. *See Stebbing v. State*, *supra*, 299 Md. at 378, 473 A.2d at 925. Foster lured the proprietress of a motel into a vacant unit where Foster stabbed the victim, in order to loot the motel office. In this respect Foster, like White, killed before taking any other overt steps to steal the victim's property.

The death sentence of EUGENE SHERMAN COLVIN, who murdered during a daytime housebreaking and robbery, has been reviewed and affirmed by this Court. *Colvin v. State*, 299 Md. 88, 472

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A.2d 953 (1984). JACKIE KEVIN HARRIS killed the person in charge of a sporting goods store during an armed robbery. He pleaded guilty to charges of first degree murder, armed robbery and a handgun violation. A judge on April 5, 1982 sentenced him to death. This Court vacated that death sentence in *Harris v. State*, 293 Md. 329, 433 A.2d 979 (1982). At a new sentencing hearing a jury determined death to be the appropriate penalty. We have remanded Harris' case for a determination concerning the entry of the plea of guilty to first degree murder. Nevertheless, under our mandate, the death sentence remains in effect, subject to the outcome of the proceedings on remand. *See Harris v. State*, 299 Md. 311, 474 A.2d 890 (1984).

A jury in the Circuit Court for Harford County sentenced LAWRENCE JOHNSON to death for murder committed during a daytime housebreaking and robbery. Johnson committed the crimes with Dwayne T. Mayers, for which the latter received a life sentence, as noted above. Johnson's only mitigating factor in this conviction was that his act was not the sole cause of death. This sentence has not yet been reviewed by this Court. In a separate case in which the State sought the death penalty against Johnson, he received life for a murder-rape. *See Johnson v. State*, *supra*, 292 Md. 401 and the summary in *Stebbing v. State*, *supra*, 299 Md. at 378, 473 A.2d at 926-27.

From the foregoing review of "similar cases" in which the death penalty was sought and, as a consequence, trial judges filed reports with this Court, we conclude that, considering both the crime and the defendant, the sentence of death is not excessive

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or disproportionate. What we said in *Stebbing v. State*, *supra*, 299 Md. at 379, 473 A.2d at 927 also applies here.

> In the [seven] cases of life sentences where verdict sheets were completed, the mitigating factors, articulated by the sentencing authorities and found in those cases to have outweighed the aggravating factor, reflect the channelized discretion which is the object of a modern death penalty statute and not the disparity that would annul the sentence in the case at bar.

The two robbery-murder cases which produced life sentences from jury deadlocks do not alter this result. *Id.* at 379-80, 473 A.2d at 927.

Appellant has also referred to other cases in which a life sentence was imposed. Many of these are not cases in which sentences were imposed under § 413 so that trial judge reports were not required under Rule 772A. We said in *Tichnell v. State*, 297 Md. 432, 465-466, 468 A.2d 1, 18 (1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 2374, 80 L. Ed. 2d 846 (1984) (*Tichnell III*) that on § 414 reviews "the relevant inventory of cases [is] only those in which the death penalty was sought," with the exception that "we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with *relevant facts*, that designated non-capital murder cases are similar ...." (Emphasis added.) Here White has not presented the facts which, in his view, make these non-capital cases relevant. He simply argues in a conclusory fashion that they are cases of "seriously aggravated premeditated murder and contract murder" or are felony murders where "the facts are more egregious than" those in his case. This is considerably short of the factual presentation

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needed to include one or more non-capital cases in the inventory of "similar cases."

We further find from our § 414 review that

(1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) the evidence supports the finding of attempted robbery as the aggravating factor; and

(3) the evidence supports the jury's finding that the aggravating circumstance is not outweighed by mitigating circumstances.

With respect to this third finding we note that the sentencing jury had no psychiatric evidence before it. The total record on appeal reflects that five psychiatrists who examined White at Clifton T. Perkins Hospital Center were unanimous in finding that he was competent responsible and an anti-social personality. Defense counsel also had White examined by another psychiatrist, but counsel concluded that it was not in White's best interest to have this expert testify.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED, WITH COSTS.

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IN THE COURT OF APPEALS OF MARYLAND

Nos. 20 & 82

September Term, 1982

DERRICK QUINTON WHITE

v.

STATE OF MARYLAND

...hy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch,
JJ.

Dissenting Opinion by Cole, J.,
in which Davidson, J., concurs.

Filed: September 13, 1984

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Cole, J., dissenting

Today, the majority sends a loud and poignant signal of a thousand decibels to the criminal defense bar: that challenges to jurors for cause made during voir dire examination go for naught and are not preserved unless particularized and restated prior to the jury being sworn. Indeed, even if the court on its own recognizes that objections for cause have been made and ruled upon, such objections are nevertheless waived and of no effect, if counsel, with no peremptory challenges remaining, indicates that he will proceed to trial with the jury then in the box. What I find more alarming, however, is that the majority in this case holds that the defendant waived his voir dire objections by *accepting* the jury, when the record clearly reveals that he never indicated that the jury that was sworn was acceptable to him. I, therefore, respectfully dissent.

It is unnecessary to relate the facts which gave rise to the charges against the defendant in this case, because the point I address could arise in any case, irrespective of the alleged misconduct, where the defendant seeks to select a fair and impartial jury to determine his fate. I shall, however, relate certain principles to help clarify my position.

A challenge for cause in a voir dire proceeding is the first step in securing an impartial jury. The granting of such a challenge represents a finding that a particular

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juror is biased or otherwise unable to fulfill his function as an impartial trier of fact. As this Court recognized over a century ago in *Waters v. State*, 51 Md. 430, 436 (1879):

> It is a fundamental principle underlying the trial by jury, that each juror shall so far as it is possible be entirely impartial and unbiased, in order that he may hear the evidence, and decide the matter in controversy uninfluenced by any extraneous considerations whatever.

Discovering bias or partiality in a particular juror is a difficult, often subjective task. Accordingly, this Court has consigned the conduct of voir dire largely to the discretion of the trial court. *Connor v. State*, 225 Md. 543, 171 A.2d 699 (1961); *Brown v. State*, 220 Md. 29, 150 A.2d 895 (1959).[1] Nevertheless, several areas of that discretion have been supplanted by principles of law established by this Court. Although the trial judge is the principal interrogator during voir dire, the parties have a right to have their questions propounded to the jury venire, and a failure by the trial court either to propound such questions or to allow

---

1/ Maryland Rule 752 states:

> Rule 752. Voir Dire.
>
> The court may permit the parties to conduct an examination of prospective jurors or may itself conduct the examination. If the court conducts the examination it shall permit the parties to supplement the examination by any further inquiry it deems proper or shall itself submit to the prospective jurors the additions questions proposed by the parties it deems proper.

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counsel to propound such questions is an abuse of discretion. *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 143 A.2d 627 (1958). The questions cannot be in a form so general that they do not indicate to the panel the nature of the bias being probed. *Id.* Moreover, the trial judge must tailor the questioning to the circumstances of each case to ensure that any biases peculiar to that case are exposed. *Bryant v. State*, 207 Md. 369, 115 A.2d 502 (1955).

For example, if the circumstances surrounding the case give rise to a potential racial bias and the defendant seeks to question the veniremen along those lines, the failure of the trial court to elicit such information is an abuse of discretio *Brown v. State*, 220 Md. 29, 150 A.2d 895 (1959). This Court also has stated that it is error to fail to exclude a prospecti juror who had incurred a loss because of allegedly illegal business practices by the defendant, and to fail to ask questions designed to reveal whether a juror has a pecuniary interest in the outcome of the litigation. *Lockhart v. State*, 145 Md. 602, 125 A. 820 (1924); *Alexander v. Grier & Sons Co.*, 181 Md. 419, 30 A.2d 757 (1943).

More recently, and more particularly for the purposes of this case, in *Langley v. State*, 281 Md. 337, 378 A.2d 1338 (1977), this Court crafted another principle to guide the trial court's discretion in conducting voir dire. The defendant in *Langley* was on trial for the robbery of a taxicab

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driver; the State's principal evidence was the testimony of the victim and the arresting officer. The trial judge refused to ask prospective jurors whether any of them would give "more credit" to the testimony of a police officer than they would giv to other witnesses, simply because of his status as a police officer. This Court reversed, holding that "where a principal part of the State's evidence is testimony of a police officer diametrically opposed to that of the defendant, it is prejudicial error to fail to propound a question such as that requested in this case." *Id.* at 340, 378 A.2d at 1344. The Court's rationale was straightforward:

> A juror who states on voir dire that he would give more credit to the testimony of police officers than to other persons has prejudged an issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official status of the witness. The argument by the State that police officers are entitled to greater credibility because they have less interest in the outcome of the case is not sufficient to overcome such an objection.

Id. at 348, 378 A.2d at 1344.

This is not a case in which the trial court failed to propound counsel's requested question about juror bias toward police testimony -- Cardarelli generated the issue himself by volunteering that he had such a bias. Because police testimony was a part of the State's proof, Cardarelli's statement was relevant to his fitness to serve on the jury.

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Once this bias had surfaced, it was incumbent upon the trial judge to explore the nature of the bias, and, if it subsisted, to dismiss the juror for cause. As we concluded in *Langley*, a juror with this type of prejudice "has prejudged an issue of credibility in the case." *Id.* at 348, 378 A.2d at 1344.

The State argued in its brief that Cardarelli's bias was cured by his answers to the subsequent questions by the trial judge and the State's Attorney. My reading of the rec however, indicates that this effort at rehabilitation did not purge Cardarelli of his avowed inclination to give more weight to police testimony. The majority does not pursue the State's argument but assumes, *arguendo*, that even if Cardarelli should have been struck for cause, its conclusion would be unchanged because defense counsel waived this challenge.

Nor does the majority seriously contend that there was no prejudice to the defendant because he was forced to use one of his twenty peremptory strikes to keep Cardarelli from serving on the jury -- as well it should not. The law is clear that the right to exercise peremptory challenges is very different from, and a complement to, the right to challenge a venireman for cause. If a defendant must exercise a peremptor challenge to strike a venireman when a challenge for cause should have already removed that person from the jury array, and the defendant, as in this case, subsequently exhausts his

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peremptory challenges, the defendant has been deprived of the use of one discretionary challenge. Because this deprivation can be traced directly to the failure to strike the venireman for cause, the error is prejudicial and reversible, unless the trial court extended and the defendant accepted the means to cure the error in the court's prior ruling. *See, e.g., United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976); *People v. Culhane*, 33 N.Y.2d 90, 305 N.E.2d 469, 350 N.Y.S.2d 381 (1973).

This conclusion is in accord with this Court's decision in *Lockhart v. State*, 145 Md. 602, 125 A. 829 (1924). There the Court found that the trial court erred in refusing to strike a juror for cause. The Court held, however, that the error was not reversible because the trial judge had allotte to the defendant more peremptory strikes than he was entitled to under the existing law. Thus, there had been "no impairmen of the defendant's right to be tried by a properly qualified jury." The Court, nonetheless, was unequivocal on the basic principle:

> If the statutory limitation as to the number of peremptory challenges had been duly applied in the selection of the jury, a ruling which rejected a valid challenge for cause, and thus required the employment of a peremptory challenge to dismiss the objectionable talesman, would be reversible error because of its practical reduction to that extent of the number of such challenges which the defendants were legally entitled to use in the exercise of their own discretion. *Id.* at 619, 125 A. at 834.

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The *Lockhart* Court buttressed this point by citing *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), *reh. denied*, 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920), where the defendant was allowed and used twenty-one peremptory challenges, when he was entitled to only twenty, and one of those challenges was used against a juror as to whom a challenge for cause was improperly overruled. The Supreme Court held the defendant's rights had not been abridged.

In this case, the trial court offered the defendant no means to restore the peremptory challenge lost when he was forced to strike Cardarelli, who was incompetent to sit as a juror. Thus, the prejudice to the defendant remained unabated. Despite this circumstance, the majority maintains that it avails th defendant nothing because he waived the objection by stating that the jury was acceptable. The majority distorts the facts.

Although defense counsel did state "Jury Panel acceptable as constituted", he was not referring to the jury that decided the defendant's case. When defense counsel made this remark there were twelve prospective jurors in the box and two alternates, all of whom defense counsel approved.[2] But the State then challenged jurors No. 6 and No. 3 and two

2/ After the State challenged Juror No. 6, defense counsel challenged the next talesman, Lester Stufft, with his twentieth peremptory. This plainly indicates that the jury became unacceptable to defense counsel when Juror No. 6 was struck. And, because he exhausted his peremptory challenges before the jury selection process was completed, his ability to remedy any defects was handicapped.

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other jurors took their places. The State further changed the prospective jury by challenging alternate No. 2. Obviously, at this point in the proceedings the jury which had been acceptable to the defense was no longer the jury in the box. The State, at this point, indicated that this jury was acceptable, but defense counsel was never asked if this jury was acceptable and never indicated his approval. Therefore, even if "acceptable" and "satisfied" are magic words creating waiver, they were never spoken by defense counsel pertaining to this jury.

After the Assistant State's Attorney accepted the jury, he requested to approach the bench, whereupon the trial judge proceeded to resolve certain pending matters befor beginning the actual trial, as evidenced by the following colloquy:

MR. LEVITZ: ....

Members of the jury pa el presently constituted is acceptable to the State.

THE COURT: Thank you, Mr. Levitz. Mr. Kaplan.

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* * *

MR. LEVITZ: May we approach the bench on another matter?

(Conference at Bench with the Defendant present)

THE COURT: Mr. Kaplan, you advised the Court at a time before the jury was sworn you would like to withdraw your plea of not guilty by reason of insanity.

MR. KAPLAN: That's right.

THE COURT: I think I ruled on it, but if not --

MR. KAPLAN: Yes, you did.

THE COURT: I now rule that the death penalty statute is constitutional in the State of Maryland. You have made that point for the record. You have your ruling on it.

MR. KAPLAN: I have informed you of the reason I filed the motion, Your Honor.

THE COURT: Sometime ago, for the record, Mr. White filed a plea of not guilty by reason of insanity. Do you understand?

DERRICK QUINTON WHITE: Yes, sir.

THE COURT: He now says that after discussions with you he wishes to withdraw that plea so that he doesn't now claim that you are legally insane at the time of the commission of this crime. Do you understand that?

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MR. WHITE: Yes, sir.

THE COURT: All right.

MR. KAPLAN: Just for the record, I think I should state in view of the opinion of the Perkins staff we have no choice but to withdraw our plea, therefore, we are withdrawing our plea.

MR. LEVITZ: Is the Court going to appoint a foreman of the jury as the rules apply?

THE COURT: I am a little concerned about that, yes. I'd like to have somebody with a little bit more education. I propose to appoint Mrs. Herman, who is the registered nurse.

MR. KAPLAN: All right.

MR. LEVITZ: I don't have any objection.

THE COURT: Let me look at the panel, again. This is the kind of thing that gets judges in a little bit of trouble, but it's up to me to designate a foreman. I am going to appoint Mr. Cohen as foreman. I appoint Mr. Cohen solely because in my judgment based on his occupational experience he would be more adverse in handling this type of critical situation. That is discretionary on my part, and it's not meant to do anything that expresses my best judgment, so if you will trade seats with number one.

Mr. Kaplan, do you have any objection you wish to register, you have made an objection when the Court has excused or failed to excuse a juror for cause. That's already on the record. Do you have any objection to the proceeding by which this jury was empaneled. I tried to honor everybody's wishes.

MR. KAPLAN: No, I have no objection to any of that. My only objection would be that I felt Harris should have been called, if you insist she be struck for cause.

THE COURT: The record clearly indicates that Vanessea Harris was challenged for cause. It was done over your objection.

MR. KAPLAN: Yes, Your Honor.

THE COURT: All right. Swear the jury.

(Whereupon the jury was duly sworn).

The majority in summarily disposing of this issue says:

> In the case at bar the defense expressly accepted the panel when it included ten of the twelve jurors who actually served. After White's peremptories were exhausted, the membership of the panel changed by two. After those two persons were seated and before the jury was sworn, the court invited objections to the proceeding by which the jury was impaneled. Defense counsel told the court he had none. He further told the court that his "only objection" related to the exclusion of a prospective juror for cause, even though the court had pointed out that objections to excusing or failing to excuse a juror were already on the record, and, in effect, need not be repeated. Counsel's voluntary limitation on objections made to jury selection, coupled with his having shortly before pronounced as acceptable the jury as then constituted, demonstrate the defense's continued satisfaction with the panel and acceptance of the jury that served. Therefore, any error in denial of

> tha challenge for cause was waived. The substance of the statements and their effect in this case are the same as in *Calhoun v. State*, *supra*. (emphasis in original).

The majority readily concedes that the jury defense counsel found acceptable was different from the jury finally selected. Then, the majority says that defense counsel, in reply to the court's inquiry as to whether he had any objections to the proceeding by which the jury was impaneled, told the court "he had none." Of course, this is not what counsel said. Defense counsel said "No, I have no objection to any of that" — "that" referring to the procedures used during the voir dire examination. Defense counsel then said: "My only objection would be that I felt Harris should have bee called, if you insist she be struck for cause." The majority states this was a voluntary limitation on counsel's previous objections to the jury selection. This conclusion is a convenient interpretation of the record bordering on absurdity.

The majority agrees that the trial court "had pointed out that objections to excusing or failing to excuse a juror were already on the record, and, in effect, need not be repeated." The majority fails, however, to credit defense counsel with fully understanding what the court meant and

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responding accordingly. Defense counsel had ample reason for raising the Harris matter again. During in-chambers voir dire, the trial judge struck Harris for cause over defense counsel's objection. Nevertheless, Harris appeared in court as a part of the qualified pool from which the ultimate jury was to be selected. Defense counsel again inquired about her eligibility. The trial judge again excused Harris from the array. Thus, defense counsel had justifiable reason to raise the issue again to ensure that the record was clear. This was no "voluntary limitation" on any other objection defense counsel had made.

Furthermore, it is clear to me that in light of the majority's concession, not to mention plain common sense, the trial court's remarks were intended to ask the question: "I have noted your other objections which are on the record, is there any additional objection you have to the manner in which the jury was impaneled?" Defense counsel's response was to emphasize the fact that the trial court had disqualified Harris on two occasions even though he felt her qualified. Defense counsel's remarks were responsive to the court's inquiry; they did not constitute an abandonment of what the trial judge indicated was preserved on the record.

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In my view, the majority's holding makes a mockery or a game of the jury selection procedure. In order for an objection to a ruling on a challenge for cause to be preserved, counsel will have to repeat his objections at the end of the process or move that the jury be quashed or discharged before being sworn. This is contrary to what I believe the bar of Mary understands and what our case law requires.[3] This is not a case like *Glover, Robinson & Gilmore v. State*, 273 Md. 448, 330 A.2d 201 (1975), where defense counsel, after objecting to the trial court's failure to follow the statutory procedure for selecting talesman, expressly abandoned his objection by having his clients state *unequivocally* on the record their satisfaction with the jury. Nor is this case like *Neusbaum v. State*, 156 Md. 149 143 A. 872 (1928), where the trial court after being informed that a prejudicial remark had been made in front of the entire jury array, offered counsel the opportunity to start over with an entirely new panel. In each of these cases both counsel and the court understood that the objection was being abandoned.

Here, however, the transcript demonstrates that neither the court nor counsel had any idea that counsel's remarks at the bench would vitiate all objections made in the extensive in-chambers voir dire. It is more reasonable

3/ Under the common practice in many courts in this State, the judge or the clerk at the end of voir dire routinely asks counsel whether the jury is acceptable. Now, however, the majority holds that an affirmative answer to that *pro forma* question constitutes an abandonment of any prior challenges for cause unless those challenges are reaffirmed on the record.

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to conclude that counsel was following *Tisdale v. State*, 30 Md. App. 334, 353 A.2d 653 (1976), which squarely held that "counsel's response -- that the jury ultimately selected was 'acceptable' -- was merely obedient to the court's rulings and obviously not a withdrawal of the request, timely made, that the jurors be excused for cause." *Id.* at 340, 353 A.2d at 657.

The majority cites *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983), as being dispositive. *Calhoun*, however, is inapposite because the magic words "I accept" or "I am satisfied" were never uttered. In any event, to the extent that *Calhoun's* "short answer" may be considered as controlling, I depart from its holding. Not only does the short answer in *Calhoun* fail to justify its result with any reasoned analysis, its conclusion simply does not follow from the holdings in cases such as *Glover* and *Neusbaum*, where the record plainly indicated an unequivocal abandonment of a previous objection. I believe that justice requires this case to be remanded for a new trial. I, therefore, respectfully dissent.

I am authorized to state that Judge Davidson concurs in the views here expressed.

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OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
JAN 11 1985
ALEXANDER L. STEVAS
CLERK

Misc. No. 84-5736

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

1. Whether Maryland's capital sentencing statute is impermissibly mandatory because 1) it requires that mitigating factors outweigh aggravating factors before a life sentence may be imposed and 2) it fails to afford the sentencer unbridled discretion to impose a life sentence regardless of the outcome of the weighing of aggravating and mitigating factors?

Misc. No. 84-5736

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DERRICK QUINTON WHITE,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case set forth in the Petition at pages 17-20.

REASONS FOR DENYING THE WRIT

THE MARYLAND CAPTIAL PUNISHMENT STATUTE CLEARLY COMPORTS WITH THE DICTATES OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND, AS A RESULT, REVIEW IS UNWARRANTED.

Petitioner's attack on the Maryland Court of Appeals interpretation of the State capital punishment statute, permitting a death sentence for felony murder to stand based solely upon the aggravating felony, and refusing to substitute its judgment for the judgment of the sentencer with respect to

findings of fact, presents the same constitutional contention raised by other Maryland petitioners to whom review was denied.[1] That is, whether the Maryland capital punishment statute violates the Eighth and Fourteenth Amendments to the United States Constitution because the imposition of a sentence of death is mandatory where the convicted felon fails to produce sufficient evidence in mitigation to outweigh by a preponderance the aggravating factors proven by the State beyond a reasonable doubt. This burden, coupled with the statute's failure to afford a sentencer unbridled discretion to impose a sentence of life without regard to the outcome of the legislatively enacted mechanism of weighing aggravating against mitigating circumstances is alleged to render the statutory scheme unconstitutional. Because the Constitution requires no such discretionary authority, and provides no bar to the requirement that mitigating circumstances must outweigh aggravating circumstances once it is established beyond a reasonable doubt that the case is death eligible, Petitioner's contention is wholly without merit and therefore the Petition for Writ of Certiorari should be denied.

As noted in Woodson v. North Carolina, 428 U.S. 280, 303 (1976), the basic requirement of Furman v. Georgia, 408 U.S.

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[1] See Tichnell and Calhoun v. State, cert. denied and rehearing denied, No. 83-6346 (1984); Colvin v. State, cert. denied, No. 83-6740 (1984); Stebbing v. State, cert. denied, No. 84-5079 (1984). The State cites these authorities not for their precedential value, but rather for the purpose of clarifying the issue raised. However, the State submits that the rationale for denying certiorari in these earlier cases is equally applicable here.

238 (1972), was that arbitrary and wanton jury discretion be replaced with objective standards to "guide, regularize, and make rationally reviewable the process for imposing a sentence of death." In analyzing State statutes enacted subsequent to the opinion in Furman, the Florida scheme, in which a jury makes an advisory recommendation as to sentence by weighing aggravating against mitigating circumstances, following which a judge acts upon the recommendation by conducting his own aggravating versus mitigating circumstances examination, was approved. Proffitt v. Florida, 428 U.S. 242, 248-51 (1976). In fact, the Florida Supreme Court had earlier described its statute as creating a presumption of death:

> "When one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).[2]

The Maryland statute does no more than was permitted there.

The Court similarly approved the Texas scheme which required that death be imposed if two (or three, if relevant) questions are answered in the affirmative. The Texas procedure was not found to be mandatory because of the unlimited scope of evidence that could be introduced and

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[2] As recognized in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3430 n.3, 77 L.Ed.2d 1134, 1151 n.3 (1983) (concurring opinion of Stevens, J.), evolving caselaw indicates that this "presumption" may be overcome. Nevertheless, at the time approved by the Court, the Florida statute was thought to be "mandatory" to that extent.

considered regarding the second question, i.e., the potential for future dangerousness.

The focus of the Court in determining adherence to the United States Constitution was with the scope of evidence that can be considered in insuring that an individualized sentence is imposed. Because of a restriction on evidence precluding the imposition of an individualized sentence, the capital punishment schemes of North Carolina, Woodson v. North Carolina, supra, and Louisiana, Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), were invalidated. As noted in the Roberts plurality opinion, the Louisiana statute, for example, provided "no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." Id. at 333-34.

Petitioner does not contend, as he cannot, that the Maryland capital punishment scheme is mandatory in the same sense as Woodson or Roberts.[3] Nor can Petitioner contend that the Maryland capital punishment statute in any way limits his right to produce evidence in mitigation or precludes

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[3] By Chapter 521, Laws of 1979, subsection g(8) was added to the statute, Article 27, §413, permitting the sentencer to delineate:

> "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

consideration of any mitigating circumstance.[4] Rather, Petitioner contends that, while the Constitution may require the guidance of discretion through aggravating and mitigating circumstances in imposing a sentence of death, the Constitution simultaneously proscribes restrictions on discretion at the same sentencing proceeding regarding the sentencer's ability to impose a sentence of life.

In support of this proposition, Petitioner has placed reliance upon Justice Stevens' opinion respecting the denial of certiorari in Smith v. North Carolina, ___ U.S. ___, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). In that opinion, Justice Stevens seems to have separated the consideration of

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[4] In his dissent to the denial of certiorari in Stebbing v. State, ___ U.S. ___, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984), Justice Marshall asserts that because the specific mitigating factors listed are "matters of legal and moral judgment" rather than "historical fact" there is an increased likelihood that the defendant will fail to completely prove a mitigating factor. Thus, Justice Marshall reasons, "the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof." However, while the failure of proof does preclude a sentencer from finding the specific enumerated mitigating factor, nothing in the Maryland scheme would prevent the sentencer from finding that which is proven to be an "other" mitigating factor under Art. 27, §413(g)(8). The sentencers in Maryland have yet to experience any difficulty in articulating "other" mitigating fetors, such as "environment." In the speculative case of a jury unable to articulate a mitigating factor proven, but "too intangible" to write into words, the result will not be death, but a jury unable to conclude on an appropriate sentence - which under Art. 27, §413(k)(2) results in a life sentence. Moreover, sentencing juries are not expected to presume anything with respect to what may or may not be included within this open mitigating factor; they are instructed that they may include any fact or circumstance proven they find has a mitigating effect.

aggravating and mitigating circumstances from the determination as to whether "death is the appropriate punishment in a specific case." Id. 103 S.Ct. at 475, quoting Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). However, a review of the opinion in Lockett fails to indicate any basis for distinguishing between the weighing of aggravating and mitigating circumstances and the inquiry into whether "death is the appropriate punishment in a specific case."

The above-referenced quotation from Lockett may be more readily understood in its context of discussing the earlier Woodson opinion:

> "The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of inflicting the penalty of death.' Woodson v. North Carolina, 428 U.S. at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978, in order to insure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.' Id., at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978. . . ." Lockett v. Ohio, 438 U.S. at 601.

Thus, as is readily apparent, that portion of the Lockett opinion did not contemplate a separate inquiry into whether death is appropriate; rather, it indicated that the Constitution mandated some type of procedure that would enable the sentencer to consider the character and record of the individual offender and the circumstances of the particular offense. Maryland has satisfied this constitutional

obligation in its system of aggravating and mitigating circumstances.

Acceptance of Petitioner's argument, moreover, would inevitably lead to the reinstitution of a system allowing unbridled discretion. If life sentences may be imposed without regard to articulated aggravating and mitigating factors, there will soon be no principled and rational way to differentiate the few cases in which the death penalty is imposed from the many in which it is not. All the Maryland statute requires is that the sentencer identify the mitigating factor - be it statutory or otherwise - that outweighs the statutory aggravating factors in the case. Without such articulation, the statutorily mandated proportionality review conducted by the Court of Appeals of Maryland would become immensely difficult. See Maryland Code, Article 27, §414(e)(4); Tichnell v. State, 297 Md. 432, 464-65, 468 A.2d 1 (1983). Under the opinions in Proffitt and Lockett, the Maryland procedure is constitutionally sound.

In addition to the prior decisions of this Court supporting the State of Maryland's position concerning the absence of any need to provide a sentencer with absolute discretion to impose life without regard to the outcome of the weighing process, the same decisions support the constitutionality of the burden imposed upon the convicted felon. All that is required under the prior decisions of this Court is that the jury be given the opportunity to determine whether or not mitigating factors exist.

In sum, the Maryland Legislature has enacted a system of guided discretion assuring that a death penalty will be imposed only after consideration of the circumstances of the crime and the characteristics of the defendant. There is no restriction on what may be considered as a mitigating circumstance and no restriction on the relevant evidence that a defendant may produce. As a result, there is simply no constitutional infirmity and no need for further review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interests.

Respectfully submitted,

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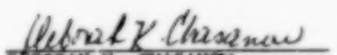

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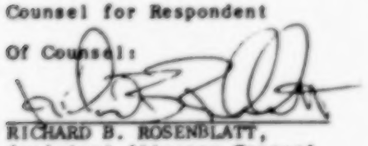

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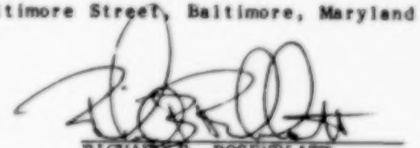
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 1985, the Brief in Opposition to Petition for Writ of Certiorari was mailed to the Court, and copies thereof were mailed, postage prepaid, to George E. Burns, Jr., Assistant Public Defender, Tower Building, 222 E. Baltimore Street, Baltimore, Maryland 21202.



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OPINION

SUPREME COURT OF THE UNITED STATES

DERRICK QUINTON WHITE *v.* MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 84-5736. Decided March 18, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Court of Appeals of Maryland insofar as it leaves undisturbed the death sentence imposed in this case. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner was sentenced pursuant to a statute that *requires* that a death sentence be imposed *whenever* the mitigating circumstances do not outweigh the aggravating circumstances. Md. Ann. Code, Art. 27 §413(h) (1982 and Supp. 1983). The statute leaves no room for the jury to consider whether death is the appropriate punishment in a specific case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland*, —— U. S. ——, —— (1984) (dissenting from denial of certiorari), I believe that such a statute is unconstitutional. The question presented here, which is also presented by other state statutes, is clearly worthy of this Court's attention. See, *e. g.*, *Maxwell* v. *Pennsylvania*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari); *Smith* v. *North Carolina*, 459 U. S. 1056 (1982)

(STEVENS, J., respecting denial of certiorari). I therefore dissent from the Court's refusal to hear this case.

JUSTICE POWELL took no part in the consideration or decision of this case.